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Supreme Court, U.S.
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No. 00-1583

In the Supreme Court of the United States

NANCY L. KAHN,
Petitioner,

v.

DEAN & FULKERSON, P.C., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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I. INTRODUCTION AND SUMMARY

There are at least three major components to the Respondents' Brief. First, they argue that the decision below does not conflict with any decisions by this Court. Central to this argument is Respondents' assertion that it is "unclear" whether the evidentiary principles for proving pretext outlined by this Court in Reeves v. Sanderson, 520 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) "have any applicability to claims under the Equal Pay Act." (Respondents' Brief, p.10.) Since both the Reeves decision and the subject case turned the issue of whether there was sufficient evidence of pretext to go to the jury, Respondents' continued arguments that this Court's holdings in Reeves may be inapplicable serves to further demonstrate the need for this Court to clarify the issue.

Respondents' second major argument is that there is no circuit split and that to the extent the circuits themselves have specifically acknowledged that split, the differential in the application of the burden of proof is "pure semantics." Ironically, Respondents cite additional cases from various circuits that, upon actual review, further demonstrate the gross inconsistencies between the circuits in both the description and the application of the burdens of proof in Equal Pay Act cases.

The third major component of Respondents' brief is a very lengthy rendition of the testimony of one of the Respondents, taken in the light most favorable to them. The story contained in Respondents' Brief conflicts with their own contemporaneous records, with the testimony of other individual Respondents, and with the testimony of the Petitioner. (See Affidavits of Petitioner filed with district court on 8/17/98 and 7/6/98, Appendices J & K, 87a- 97a, of

this Reply).

In order for a fact finder to believe Respondents' story, it would be necessary for the fact finder to accept the claim that a series of misunderstandings and coincidences caused the Respondents' story to be at odds with their own records on virtually every occasion, and caused the Respondents to disregard their established compensation system on two different occasions, for two completely different reasons, once they were confronted with the first female attorney who was about to become highly compensated under the system.

The point here is not that the Court below made a bad decision, rather, the erroneous application of the burden of proof in Equal Pay cases, combined with the refusal to apply this Court's rules regarding proof of pretext, is causing various circuit and district courts to accept the defendant employers' inevitable story regarding their nondiscriminatory motivation at face value. This places an impossible burden on plaintiffs.

In addition to evaluating the three major components of Respondents' arguments listed above, it is important to note, as a preliminary matter, that Respondents' own brief confirms that their asserted reasons for the pay differential were completely inconsistent with their own compensation policy, and therefore fail to qualify as an affirmative defense as a matter of law.

Respondents admit that they refused to provide equal pay after Petitioner's first year of employment based on what they now characterize as "dissatisfaction with her interaction with other members of the firm." (Respondents' Brief, p. i, ¶ 2 of Questions Presented.) Since the Respondents'

compensation system is admittedly based entirely on financial productivity, and since no male employee has ever has his compensation based on matters involving "dissatisfaction with interaction with other members of the firm," the Respondent's brief confirms that they have not met their burden of proving that the pay differential was based on a "bona fide" evaluation or classification program that the Respondents' actually employed. Therefore summary disposition should have been entered against them in accordance with the holding of this Court in Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed 2d 1 (1974).

II. THE REFUSAL OF RESPONDENTS AND THE SIXTH CIRCUIT TO RECOGNIZE THE APPLICABILITY OF REEVES V. SANDERSON.

Respondents continue their refusal to acknowledge that the evidentiary principles that can be used to establish pretext, as announced by this Court's decision in Reeves v. Sanderson, have any applicability to in Equal Pay Act cases.

> "It is unclear, however, whether Reeves has any applicability to claims under the EPA." (Respondent's Brief, p. 10.)

Respondent's refusal to acknowledge the applicability of the evidentiary principles announced in Reeves was apparently accepted by the Court of Appeals given the Court's failure to address the holdings in Reeves.[1]

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[1] In the courts below the Respondents took this argument one step farther , asserting that the court may not even consider whether the asserted defense might be a pretext. Respondents

Regardless of the burden of proof analysis that is applied, it would seem elementary that once the issue before the court involves whether there is evidence to support a jury finding of pretext, the evidentiary principles for proving pretext announced by this Court in Reeves must be considered.

III. PLAINTIFF USED A SUBJECTIVE "STATE OF MIND" DEFENSE, IN COMBINATION WITH A DEFENSE MOTION FOR SUMMARY DISPOSITION, TO DEMAND DIRECT EVIDENCE OF THE EMPLOYER'S DISCRIMINATORY STATE OF MIND

Respondents' strategy in this case was simple. They used a subjective defense theory that hinged on the Respondents' state of mind (i.e., that Petitioner was denied equal pay because two of them "were dissatisfied with Petitioner's interaction with other members of the firm"). (Respondent's Brief, p. i, ¶ 2.) They then combined this defense with a Motion for Summary Disposition, arguing that the Plaintiff could not provide sufficient evidence to disprove the Defendant's subjective, "state of mind" defense.

Respondents argue that once the employer defendant has moved for summary disposition based on defense testimony that their motive for the wage differential was nondiscriminatory, the employee plaintiff has the burden of producing additional evidence "bearing on the truth of her

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argued: "Thus, as the District Court properly recognized, the issue of "pretext" is not involved in an EPA case at the summary judgment level." (Emphasis in original.) (Respondents' Sixth Circuit Brief on Appeal, pp. 35-36.)

employer's" stated motivation in order to survive summary disposition. (Respondents' Brief, p. 16.) This is the equivalent of requiring "direct" evidence of discrimination and is contrary to the holding in Reeves.

Respondents attempt to argue that Petitioner's approach would preclude summary disposition for defendants in all Equal Pay cases. That grossly overstates the argument. When an EPA Defendant asserts an objective defense that is consistent with its bona fide evaluation system, summary disposition might be possible after an analysis of the type outlined by this Court in Reeves. However, when, as here, the employer asserts a purely subjective, "state of mind" defense, and then calls on the plaintiff to rebut it, the defendant should rarely be entitled to summary disposition because in most cases a jury would not be required to accept a subjective, "state of mind" defense based on this Court's holding in Reeves.

IV. RESPONDENTS SEEK TO ERASE THE STATUTORY BURDEN OF PROOF PLACED ON EQUAL PAY DEFENDANTS ONCE A PRIMA FACIE CASE HAS BEEN MADE.

The clarity of the Respondents' argument is revealed on p. 15, of their Brief where they state the following:

> "Petitioner offers no legal authority for the proposition that a showing of a pay disparity - of any magnitude - between a female and a male employee for equal work on jobs requiring equal skill effort and responsibility (the elements of a *prima facie* case under the EPA) raises any inference that would tend to negate a defendant's affirmative defense that

the disparity was based on a factor other than sex." Respondents' Brief, p. 15, Note 5.

This argument is **directly** in opposition to this Court's holding in Reeves which states:

> ". . . (T)he trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." Reeves v. Sanderson, supra, 120 U.S. at 2106.[2]

V. A DIRECTLY ARTICULATED SPLIT BETWEEN THE CIRCUITS ON IMPORTANT BURDEN OF PROOF ISSUES IS NOT "MERE SEMANTICS."

The articulated Circuit split involves whether the burden shifts back to plaintiff to prove pretext once the defendant has offered evidence of one of the four affirmative defenses. Respondents urge the Court to disregard the conflict as "purely semantic". (Respondents' Brief, p. 22) Burden of proof rulings are hardly semantics. The ruling of the 11th Circuit in Irby v. Bittick, 44 F.3d 949, n.8 (11th Cir. 1995) confirmed that the burden is on the EPA plaintiff to show pretext. Plaintiff's case in Irby was dismissed despite a staggering wage differential of 50%, for what was admittedly equal work, because of the burden that was placed on plaintiff to directly refute the employer's testimony

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[2] The inference to be drawn from a prima facie EPA violation according to the Second Circuit is an inference of discrimination. Belfi v. Prendergast, 191 F.3d 129, 136 (2nd Cir. 1999).

regarding their motivation. Id at 953, n.3 and 954.

The Second Circuit has also shifted the burden back to the EPA plaintiff to show pretext. In Belfi v. Prendergast, 191 F.3d 129 (2nd Cir. 1999) the Court held that while the "burden of persuasion" shifted to the defendant after the EPA plaintiff made out a prima facie case, "once the (defendant) proffered . . . gender neutral explanations to (plaintiff's) claim of "unequal pay" . . . the burden of persuasion shifted back to Belfi to show that the (defendant's) explanations were a pretext for gender based discrimination." Belfi, supra, at 137.[3] The Fourth Circuit similarly has ruled that once the defendant produces "credible evidence of one of the four EPA defenses," the burden of production shifts back to the Plaintiff "to come forward" with evidence of pretext. Brinkly v. Harbaur Recreation Club, 180 F.3d 598, 614 (1999).

The cases cited in both briefs, as well as the rulings of the Court below, demonstrate that the circuit split, regarding the extent to which the burden is shifted back to Plaintiff to

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[3] One thing that almost all of the Circuits seem to have in common, regardless of how they articulate the burden of proof, is the fact that employee plaintiff's are routinely refused their day in Court. The Seventh Circuit noted it affirmed summary judgment for the employer in 21 of 26 employment discrimination cases in 1996. Wollenburg v. Comtech, 201 F.3d 973, 976-977 (7th Cir. 2000). In Wollenburg, plaintiff's case was dismissed after she had made out a prima facie case and after the articulation of the Defendants' "reason other than sex" for the wage differential. Defendants reasons were taken at "face value" without any analysis as to possible inferences or credibility issues. (The employer's asserted reason was that although both the male and female employees had prior unrelated experience, the male employees had more unrelated experience than the female employees.)

demonstrate pretext, is specifically recognized by the Circuits themselves. The split directly affects the outcome in the cases cited. It is hardly semantics.

VI. RESPONDENTS' ARGUMENTS REGARDING THE CREDIBILITY OF THEIR DEFENSE ARE NOT EVEN SUPPORTED BY THEIR OWN BUSINESS RECORDS OR BY THEIR ADMISSIONS IN THE PLEADINGS IN THIS CASE.

It would be difficult for an employer to have ever concocted a greater number of unsupported, ever-changing and conflicting defenses than the ones that have been presented in this case. The inconsistencies alone preclude summary disposition. As stated by the Second Circuit in Belfi v. Prendergast, 191 F.3d 129, 139 (2nd Cir. 1999):

> "Circumstantial evidence in the form of differing and inconsistent explanations from the (Employer) raise questions of fact to rebut its alleged non-discriminatory reasons for the wage disparity, and may provide the jury with a basis to find pretext.

Here, the list of Respondents' falsehoods, inconsistencies and changes in position could fill dozens of pages. In addition to the examples of inconsistencies contained on pp. 4-5, 21-28 of the Petition, consider the following:

- Respondents' claim that a similarly situated male attorney once had the same compensation formula is false. Their records show that that attorney had been hired from a corporation, did not have his own clientele, and was therefore not similarly situated.

The firm transferred him to the standard formula once he had his own clientele.

- Contemporaneous documents refute Respondent's claim that Petitioner only generated $69,000 in prior years. That figure was only the formal billing credit assigned to Petitioner at her prior firm, in addition to which she was bringing two more large clients with additional combined yearly fees of approximately $86,000. (See memo at Appendix L, pp. 98a-99a, of this Reply). Respondents memos projected an additional $50,000 in work for Petitioner from their clients. (Respondents' documents and testimony show identical projected earnings at the time of hire for Petitioner and her male counterpart).

- Respondents' claimed contemporaneous memo asserting that Petitioner was risk adverse is actually a written diatribe "vigorously dissenting" to her hire and containing discriminatory statements about the fact that she had children ("prior commitments").

- Respondents' argument that Bill Coon's discriminatory remarks should be disregarded because he was not at the 5-22-95 meeting is disingenuous. Respondents documents confirm that Coon was the author of the recommendation to the 5-22-95 meeting to continue the substandard compensation formula for a second year.

VII. RESPONDENTS' ARGUMENT THAT THE FOURTH AFFIRMATIVE DEFENSE IS A BROAD, ALMOST LIMITLESS DEFENSE IS CONTRARY TO THIS COURT'S HOLDING IN CORNING V. BRENNAN.

At p. 29, Respondents argue that "EPA's fourth affirmative defense -any factor other than sex- is a broad, catch-all exception that embraces almost a limitless number of factors so long as they do not involve sex." Such a broad based defense would swallow up the Act.

This Court held in Corning that the Act is a broadly remedial act intended by Congress to be liberally construed to further its ends. Congress specified in the legislative history regarding the EPA's fourth affirmative defense that the intended protection for employers was only for the good faith application of their own bona fide compensation policies.

The subject case provides a striking example of how such a limitless "anything goes" defense would thwart the intent of Congress. Respondents here have a rock solid policy regarding their basis for compensation. If the "factor other than sex" defense is construed to be so limitless that employers can successfully meet their heavy burden by asserting a reason that totally disregards their own compensation policies, the Act will not be enforceable.

This was clearly not the intent of Congress with respect to the fourth affirmative defense, as reviewed by this Court in Corning v. Brennan. Consistent with this Court's analysis in Corning, the Court should confirm that the affirmative defense of a 'factor other than sex" must be at least consistent with the employers bona fide method of evaluation and compensation in order to be valid. If, as in this case and in the Corning case, the employer seeks assert a defense that is inconsistent with its own evaluation criteria, then that defense must fail as a matter of law and the plaintiff must prevail based on her prima facie case.

Respectfully submitted,

/s/ _____

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June 2001

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed August 17, 1998]

No. 97-71559

NANCY L. KAHN,
Plaintiff,

v.

DEAN & FULKERSON, P.C. LARRY M. BOLTON, GEORGE BURNARD, READ A CONE, III, WILLIAM G. COON, JAMES P. DEAN, JOHN L. GIERAK, PAUL R. GILLERAN, JEROME C. GROPMAN, CLARENCE L. HUDSON, JEFFREY L. HUDSON, IAN R. HUNTER, JANET E. LANYON, LAURENCE M. LUKE, THOMAS P. MARTIN, PAUL J. MASTRANGEL, ROBERT L. MERCADO, DONALD A. PIERCE, JR., DAVID L. TENNENT, RICHARD J. TENNENT, CAROL L. VONDALE,
Defendants.

Hon. Bernard A. Friedman

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AFFIDAVIT OF NANCY KAHN

NANCY L. KAHN, being first duly sworn, deposes and says as follows:

1. I am an attorney who was employed by Defendant Dean & Fulkerson during the time period between May 6, 1994 and March 15, 1996.

2. I am the Plaintiff in the above captioned case and if sworn as a witness I would testify in accordance with the statements made in this Affidavit.

3. The factual conclusion reached by this Court on p. 13 of its Opinion and Order Granting Defendants' Motion for Summary Judgment ("Opinion"), to the effect that any pay

differential between Plaintiff and others was based upon Plaintiff's request for a deferral of expenses, is factually inaccurate. I requested a deferral of expenses so that I would not be writing checks to Defendant Dean & Fulkerson during the first few weeks or months until there were receipts to cover the expenses. I testified to this in my deposition as attached at Exh. C. The expense deferral that I requested is consistent with Defendants standard compensation procedure as admitted to by Defendants' accountant, Marianne Sheppard, attached as Exh. A. The expense deferral which I requested is also exactly the same expense deferral that was given to James O'Brien. (Exh. A).

4. The Court's factual conclusion contained on p. 13 of its Opinion, to the effect that the wage differential which Plaintiff experienced resulted from her desire to negotiate a one (1) year contract arrangement, is factually inaccurate. Both Plaintiff and James O'Brien had one (1) year contractual arrangements which were almost identical with the exception of the higher compensation formula that was given to Mr. O'Brien.

5. The Court's conclusion at p. 14 of its Opinion, to the effect that I was offered the firm's standard formula, is false. The firm's standard formula was described to me during first meeting with Defendant Coon, in

accordance with Mr. Coon's deposition testimony (Exh. D). I acknowledged that I was willing to take the risk except for a short term deferral of expenses until there were receipts to cover them, which I later learned was a standard part of Defendant's compensation system (Exh. A and C). Defendant Coon advised me at the initial meeting that he was not sure that the Defendants would offer me the standard compensation initially then returned to me with a reduced compensation proposal for what he called a "developmental period" that would be a year at most. He assured me that at the conclusion of that period I would be placed on the standard compensation formula.

6. The Court's conclusion that I "negotiated" my own contract is not factually correct. The contract offer was made to me on a take it or leave it basis. It included benefits that I had absolutely no use for and which I never received such as medical insurance for one (1) person and furniture. (I had my own furniture which I was planning to and did bring with me).

7. The Court's conclusion at p. 13 of its Opinion that I was fearful that the standard formula could leave me without a paycheck is factually false. I knew for a fact that both the standard and the reduced formula would necessarily leave me without a paycheck for an initial

period of weeks or months. I was not fearful about that eventuality; if I had been I would have never have proceeded to join Defendant Dean & Fulkerson or bring my clients there. Moreover, I had been an equity partner for years and I had been billing clients on my own for a short period of time and, therefore, was comfortable with such uncertainties.

8. In May, 1995, when my contract that was supposed to run for a maximum of one (1) year had expired, Defendants initially deflected my request for the agreed upon elevation to standard compensation by saying that they were too busy to discuss it. Subsequently, they asserted that they would not even vote on the issue of equal pay or shareholder status because Defendant Lanyon had stated that she was upset about a conflict of interest waiver issue that had arisen some six (6) or seven (7) months prior. All of the Defendants with whom I spoke regarding this articulated defense to the lack of equal pay expressed that they did not believe that it was valid complaint.

   a. Defendant Coon stated at the time of the events that Lanyon "better get ready" because he would be asking her for a conflict waiver the same as Plaintiff had if a coverage issue arose with one of his clients.

b. Defendant Burnard opined that the ~~ma~~tter was "routine".

c. Defendant Gropman admitted that the matter "nothing".

d. Defendants Dean, David Tennent, and Larry Luke expressed that they had not even been advised of the substance of the articulated defense.

e. Defendants Dean and Coon refused to permit Plaintiff to attend a meeting or respond in any way to any concerns which they claimed precluded a vote on equalizing compensation.

9. Regarding the statement relating to female staff as "fungible goods", the factual conclusion by the Court that there were both male and female secretaries at the firm at the time this statement was made is factually inaccurate. The statement was made in April, 1994, and there had never been a male secretary at the firm prior to that time. The only male secretary transferred into the firm with an incoming attorney over one and half (1 ½) years later and, on information and belief, left shortly thereafter.

10. Defendant Coon, who made the statement referencing the female staff as "fungible goods" was the Defendant who proposed Plaintiff's reduced compensation formula. He also gave his proxy to Lanyon at the time of the May, 1995 meeting presumably with the knowledge that it would be used in a way that would not permit equal pay or shareholder status for Plaintiff. Moreover, Plaintiff was advised repeatedly that Defendant Coon, as the head of the Professional Personnel Committee, made the determination to recommend a continuation of Plaintiff's substandard wages instead of a proposal for standard compensation. In addition, Defendant Coon rejected all of Plaintiff's requests to respond to the pretextual defense to equal pay, told Plaintiff not to get involved, and suggested that Plaintiff rely on him to "finesse" the situation.

Further, Deponent sayeth not.

/s/_____
NANCY L. KAHN

Subscribed and sworn to before
me this_____.

/s/_____
, Notary Public
, State of Michigan

My Commission Expires:

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed July 6, 1998]

No. 97-71559

NANCY L. KAHN,
Plaintiff,

v.

DEAN & FULKERSON, P.C. LARRY M. BOLTON, GEORGE BURNARD, READ A CONE, III, WILLIAM G. COON, JAMES P. DEAN, JOHN L. GIERAK, PAUL R. GILLERAN, JEROME C. GROPMAN, CLARENCE L. HUDSON, JEFFREY L. HUDSON, IAN R. HUNTER, JANET E. LANYON, LAURENCE M. LUKE, THOMAS P. MARTIN, PAUL J. MASTRANGEL, ROBERT L. MERCADO, DONALD A. PIERCE, JR., DAVID L. TENNENT, RICHARD J. TENNENT, CAROL L. VONDALE,
Defendants.

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AFFIDAVIT OF NANCY L. KAHN

NANCY L. KAHN, being duly sworn, deposes and says as follows:

1. I was an attorney employed by Defendant Dean and Fulkerson during the time period between May, 1994 and March, 1996.

2. When I first contacted the Defendants regarding employment, I was advised by Defendant Mastrangel that the firm had a minimum requirement of a $300,000 'book of business' in order to qualify and that the firm was not interested in me because I did not meet that qualification. I later learned that there was no such qualification and that very few of the male employees, including the replacement

environmental attorney, could meet any such qualification.

3. After I was subsequently hired at a reduced level of compensation for the first year, I requested that Defendant Lanyon request a conflict of interest waiver from her client, Amerisure, based on a potential insurance coverage issue that was developing regarding an environmental site with respect to which I had been representing one of my regular clients for some time. When Lanyon delayed repeatedly in asking for the waiver, I brought the matter to the attention of Defendant Bill Coon in accordance with Firm policy. Defendant Coon advised me at the time that he realized that these types of conflicts would develop from time to time with Amerisure because of it was a large business insurer and the firm had a large business clientele. He advised Plaintiff that Lanyon had "better get ready' because he would be asking for the same thing if a similar situation arose with one of his clients. He expressed no concern regarding any letter send by Plaintiff.

4. Subsequently, two other Defendants contradicted the asserted pretext by referring to the situation as 'nothing' and as 'routine'.

5. Plaintiff never worked with any of the Defendants referenced in Defendant Cone affidavit and never would have had occasion to

work with them in the future because they were labor lawyers.

6. Plaintiff was never permitted to attend any of the 'team' meetings referenced in Larry Luke's deposition.

7. Plaintiff was never permitted to attend any 'shareholder' meetings at the firm, although there were periods of time when plaintiff was the only attorney excluded from those meetings and they were attended by 'associate shareholders' and in some cases non shareholders such as attorney James O'Brien.

8. Plaintiff was placed on a floor with mostly administrative staff and very few attorneys.

/s/_____
NANCY L. KAHN

Subscribed and sworn to before
me this_____.

/s/'_____
, Notary Public
, State of Michigan

My Commission Expires:

APPENDIX L

MEMORANDUM FROM NANCY KAHN TO BILL COON

[Dated March 29, 1994]

To: Bill Coon
From: Nancy Kahn
Re: Requested Billing Information

1. 1993 - Billable and contingent hours: 1,360
- Non-billable hours: 446

Total 1,764

(Note: non-billable hours were very high in 1993 because of merger negotiations and litigation supervisiion)

2. 1993 - Contributing attorney fees billed: $171,491

3. 1993 - Billing attorney fees received: $69,601
1992 - Billing attorney fees received: $64,925

4. In addition to the clients for which I have billing responsibility, I will be bringing 2 others, at a minimum.

a. The first additional client just started a large environmental project scheduled to be

completed 1999. The bills for that project alone I would anticipate to run $2,000-$3,000/month (e.g., Jan was $4,544 and Feb. was $3,283).

In addition, the client is a PRP at several Superfund sites and is self-insured at the Mich. plant up to the first $1 million.

b. The second additional client is starting a large remediation project. It had one Superfund site problem that is of major significance. We recently billed them $50,000 for mostly environmental and some partnership work. This client's work should wind down in the next year if things go well for the client.

5. I am guessing that this will add up to $100,000 in billing in the next year, but that is by no means assured.

Please let me know if you have questions or need additional information.

Nancy